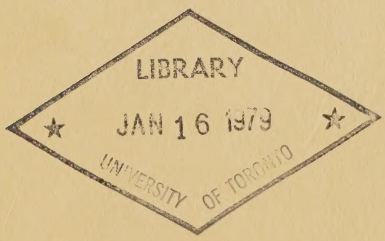
Ontario

Commission on Freedom of Information and Individual Privacy

The Freedom of Information Issue: A Political Analysis



Research Publication 1

THE FREEDOM OF INFORMATION ISSUE: A POLITICAL ANALYSIS

by Donald V. Smiley
Professor of Political Science
York University

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Commission on Freedom of Information
and Individual Privacy

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Ontario

Commission
on
Freedom of Information
and
Individual Privacy

416/598-0411

180 Dundas Street West
22nd Floor
Toronto Ontario
M5G 1Z8

D. Carlton Williams, Ph.D.
Chairman

Dorothy J. Burgoyne, B.A.
G. H. U. Bayly, M.Sc.F.
Members

W. R. Poole, Q.C.
Counsel

J. D. McCamus, L.L.M.
Director of Research

Hon. J. C. McRuer, O.C.
Consultant

Doris E. Wagg
Registrar

FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the Government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the Government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the Government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of Government information;

3. The categories of Government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of Government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of Government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 1. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the Province a good turn in having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The terms of reference of this Commission compel consideration of a number of profoundly difficult questions concerning the functioning of democratic government in contemporary social conditions.

In particular, the freedom of information debate has raised searching questions concerning the accountability of a modern government to its electorate. Some participants in the debate argue that the traditional mechanisms of accountability -- elections, opposition parties, a free press -- are no longer adequate. The increasing complexity of the social and economic problems our governments are asked to solve and the correspondingly complex bureaucratic structures and regulatory agencies which their solution often entails place severe strains on our capacities for critical assessment of the conduct of public affairs. On this view, greater access to government information would provide additional opportunities for democratic supervision of governmental processes and activity.

Others have urged that the traditional mechanisms of accountability and control do provide adequate safeguards, given the need to balance the democratic concern with accountability against the public interest in ensuring that government has the ability to carry out its mandate effectively and, when the occasion demands, promptly.

Professor Smiley, a distinguished political scientist, was asked by the Commission to prepare a paper which would reflect on these questions from his perspective as a political scientist who has focused much of his professional work on an examination of Canadian political institutions. It was hoped that the Commission would be assisted by an attempt to properly locate the freedom of information issue within the framework of liberal democratic values manifest in our system of government. Further, it was intended that Professor Smiley should attempt to identify those major themes of the Canadian political culture that are particularly relevant to the information access debate.

It is evident that such a task could be assumed only by a political scientist of Professor Smiley's stature and experience. Professor Smiley is the author of numerous articles and books on Canadian politics and political institutions, most recently, "Canada in Question: Federalism in the Seventies". He is a member of the Political Science Department of York University and the Editor of "Canadian Public Administration".

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. Those who wish to communicate their views in writing to the Commission are invited to write us at the following address:

Registrar
Commission on Freedom of Information
and Individual Privacy
180 Dundas Street West, 22nd Floor
Toronto, Ontario M5G 1Z8

It should be emphasized, however, that the views expressed in this paper are those of the author and that they deal with questions on which the Commission has not yet reached a final conclusion.

John D. McCamus
Director of Research

THE FREEDOM OF INFORMATION ISSUE:
A POLITICAL ANALYSIS

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THE FREEDOM OF INFORMATION ISSUE: A POLITICAL ANALYSIS

INTRODUCTION

This paper was written by a political scientist whose major professional interests are in the institutions of Canadian government and in public administration. I had not hitherto taken a high degree of interest in the matters before the Commission, matters which have already been the focus of concern for an academic specialty. I make no claim to have read more than a fraction of the specialized literature on government secrecy and individual privacy.

The government information-privacy issue forms some of the most fundamental political relations -- between government and the governed, between executive and legislature, executive and judiciary, political executive and appointed bureaucracy, government and elite groups in the private sector. The paper proceeds from a systemic viewpoint and attempts to discuss these relations from both an empirical and a normative perspective. Chapter I is a general analysis of the distribution of information within contemporary western democracies. Chapter II discusses some of the particular aspects of the Canadian system of politics and government as these bear on the issue. Chapter III is yet more specific in its discussion of some

of the more crucial institutional issues involved in measures to narrow the extent of secrecy in government. I have concentrated throughout on information as this relates to the making of public policy and I have almost nothing to say about the issue of individual privacy.

It is perhaps useful to ask why the information-privacy issue is now on the agenda of most of the western democracies. A ready-to-hand answer is that it has spilled over to other countries from the United States. As is not uncommon these issues were raised in the American context in a rather dramatic way, through the challenges to privacy in the congressional investigations of the McCarthy period and through the Watergate incidents and the surrounding events two decades later. Also the Americans, unlike other peoples in the English-speaking world, have the disposition to debate issues in terms of fundamental principles. Another explanation is that the current pressures to restrict government secrecy are the manifestation of a long-term and ongoing process of democratisation. Certainly in those western countries like Canada which are not founded on a revolutionary tradition, democracy has been in a sense grafted on aristocratic institutions and ways of thinking and acting. In his remarkable book published in 1958, the sociologist Edward Shils attributed the toleration of governmental secrecy in the United Kingdom as against

the United States to the circumstance that Britain was a relatively deferential country with a high degree of public trust in government and with few pressures for the elite to reveal what they were doing to the wider citizenry.[1] Yet another explanation is that measures to restrict secrecy are part of a necessary process to arrest the declining legitimacy of government, its performance and the burdens it imposes. Informed observers tell us that we are in a dangerous situation where confidence in the integrity and efficacy of action by the public authorities is weakening while there is a more urgent need than before for decisive action with the consequent exactions on citizens -- those exactions may be even more severe than otherwise when governments are under pressures to restrain expenditures and to cut back on pre-existing levels of public services. Thus making government more open may at least in a marginal way help to stem the tide of public mistrust in governmental institutions. These various explanations of the importance of the secrecy issue are of course not contradictory.

1 The Torment of Secrecy: The Background and Consequences of American Security Politics, Free Press, Glencoe, Illinois, 1958, pp. 36-60. In the period Shils was writing populist pressures in the United States led not only to invasions of personal privacy but also to a counter-movement emphasizing secrecy, the latter based on the tendency towards conspirational theories with the consequent need to preserve public secrets against the communists.

CHAPTER I

THE AVAILABILITY OF INFORMATION ABOUT GOVERNMENT AND LIBERAL DEMOCRACY

The point of view which underlies this paper asserts that the distinguishing characteristic of liberal democracy is the effective accountability of the public authorities to those whom they govern. The British political philosopher John Plamenatz linked the availability of information about government to accountability in these terms, "What the theorist of democracy has to do is to explain how relevant information must be distributed in a vast political community if makers of law and policy are to be responsible to their subjects."[1] My emphasis is thus on accountability rather than participatory democracy. This latter condition was the preoccupation of many in the 1960s and the early years of this decade. Such an emphasis has now waned. The more urgent questions on the liberal-democratic agenda now appear to be whether modern societies are governable at all and how we can organize our affairs to make those who govern them accountable.

1 Democracy and Illusion, Longman, London, 1973, p. 177. Plamenatz's arguments have very much influenced my thinking in this Chapter. See particularly pp. 172-179.

Structures of Authority, Public Debate and the Accountability of Governments

In the best of all conceivable worlds of accountable government two conditions would prevail, and the distribution of information about public affairs would operate to sustain these conditions.

First, there would be clear and well-understood relations within the government itself and between the government and the citizenry so that specific groups of governmental actors could be held responsible for particular categories of actions taken by the public authorities. We can call this the structural requirement of accountability. Second, the elected and appointed officials of government would carry on their responsibilities within the context of continuous, informed and vigorous debate with the governed about actual and projected public policies. Democracy is preeminently government through open discussion. In his Politics, Aristotle advanced the theory of the "collective wisdom of the multitude" in asserting that in respect to the "deliberative and judicial" aspects of the life of the political community the judgement of the many, even though these individuals were by definition not of superior quality, would be better than that of the well-born, talented and upright few. John Stuart Mill pleaded for widespread debate and participation in public affairs to the end that citizens become rational, responsible

and autonomous. In a negative sense, we have ample evidence that when debate about public affairs is confined to a very small number of people the resultant policies will reflect a very narrow range of values and interests -- and that the very processes of secrecy tend to homogenize the perceptions of the participants.[2] There are thus several claims made on behalf of public debate. However, within the context of this paper, such debate is considered almost exclusively in terms of effective political accountability.

To return to the structural requirement for a moment, it is necessary to make the distinction between three terms -- accountability, responsibility and answerability.[3]

The concept of accountability embodies the relationship of agency. When we say A is accountable to B, we mean two things. The first is that A can reasonably be judged to have the power to cause actions taken in his name to have occurred as they did. Second, we mean that B has the power to subject A to significant sanctions or to confer on A significant benefits on the basis of B's judgement of A's performance.

2 For a dramatic example of this in the American conduct of the Vietnam war see David Curzon "The Generic Secrets of Government Decision Making" in Itzak Galnoor, Editor, Government Secrecy in Democracies, Harper and Row, New York, 1977, pp. 93-109.

3 For a philosophic account see Herbert J. Spiro, Responsibility in Government, Van Nostrand Rheinhold, New York, 1969.

Responsibility is often used as a synonym for accountability -- "A is responsible to B". But we sometimes use responsibility in another sense as when we say "his conduct was responsible", meaning that this conduct conformed to a set of norms which we judge appropriate to the situation. About a generation ago there was a very famous debate between Herman Finer of the University of Chicago and Carl Friedrich of Harvard University about bureaucratic responsibility.[4] Finer saw such responsibility in terms of the accountability of appointed civil servants to elected officials who in turn were accountable to the people in free and regular elections. Friedrich's counter-assertion was that under contemporary circumstances responsible bureaucrats would not wait for such political direction but would take initiatives in defining and putting underway solutions for urgent public problems according to their professional norms.

Answerability is more difficult to define precisely. When we say that A is answerable for B's actions we do not pronounce one way or the other about either whether A has the power to punish or reward B or whether A did in fact have the power to cause the things B did in his name to have occurred as they did. Critics of the doctrines of cabinet and ministerial responsibility claim that

4 The debate is reprinted in Donald C. Rowat, Editor, Basic Issue in Public Administration, Macmillan, New York, 1961, pp. 459-477.

under British-type parliamentary institutions elected ministers are made answerable for actions they cannot in practice control. In terms of this argument these conventions have nothing more than a broadly therapeutic value in which the public can find somebody to punish when things go wrong.

In this paper accountability as defined above will be used as the operative norm.

The relations between the structural and public-debate requirements of accountability are complex. This complexity may be illustrated by a brief analysis of how Keynesian-type economic policies were adopted by the national governments of Canada and the United States at the end of the Second World War.

The explicit commitment of the Canadian government to Keynesian policies was made on April 12, 1945 when the Minister of Reconstruction, C.D. Howe, introduced the White Paper on Employment in the House of Commons. We have an autobiographical account of the origins of this document by its author, the late Dr. W.A. Mackintosh of Queen's University[5] who, during the war, was Director of Economic Research in Mr. Howe's Department. With the imminent end of the European war, Mackintosh had been pressing

5 "The White Paper on Employment and Income in its 1945 Setting", in S.F. Kaliski, Editor, Canadian Economic Policy Since the War, Canadian Trade Committee, Ottawa, 1966, pp. 9-21.

his Minister to issue a coherent statement of the government's post-war economic policies and in early March 1945 had been given the approval to prepare such a statement. The White Paper was written by Mackintosh in collaboration with another Queen's economist in the Department of Reconstruction. Its author insisted, successfully, that his handiwork be both understood and taken seriously by the government and, as a result, the Cabinet appointed a committee of three of its most influential ministers -- Messrs. Howe, Ilsley and St. Laurent -- to consider the draft statement. Dr. Mackintosh recollected that the committee spent "most of a day" considering the draft but made no changes of substance in it. The White Paper received no serious debate in Parliament and the content could hardly have been less auspicious for such a debate. Parliamentary and public attention was monopolized by the imminent end of the war in Europe and the expectations of an early general election -- the House of Commons was prorogued on April 13 and was soon later dissolved. The White Paper was introduced into the House in a routine way during a debate on a large war appropriations bill and Mr. Howe made no serious attempt either to explain or defend his statement. Another distraction occurred in the death of Franklin D. Roosevelt on the evening of April 12. In general then, this commitment to a very new kind of national economic policy was made by way of interactions in secret among not more than a

handful of men in Ottawa with no serious or sustained discussion in Parliament or among the wider public.

An Employment Bill was introduced into the Senate of the United States on January 22, 1945 and the Employment Act was signed by President Truman on February 20, 1946.[6] During the intervening period the proposed legislation was submitted to debate from a very wide range of opinions and interests in the Congress, the executive branch and from outside government. Not surprisingly, the Act as it emerged from this process of discussion and accommodation differed very significantly from the original bill introduced into the Senate.

In which of the two situations was the requirement of accountability more fully met? From the structural point of view, the Canadians come off better. The commitments of the White Paper were explicitly accepted by a small group of cabinet ministers who were -- and who were publicly recognized as -- the most powerful members of the government, apart of course from the Prime Minister, and there is no reason to doubt Dr. Mackintosh's conclusion that these men fully understood what they were doing. The government was sustained in the general election of June, 1945. Yet surely the narrowly restricted debate on the White Paper indicates that the

6 Stephen Kemp Bailey, Congress Makes a Law: The Story behind the Employment Act of 1946, Vintage Books, New York, 1950.

accountability requirement was not fully met. The Americans had debate but according to Bailey there was no identifiable person, group or institution responsible for the final product, the Employment Act of 1946.[7] Bailey's suggestions for meeting the deficiency were in terms of what was then the conventional wisdom among students of American government -- the strengthening of the presidency, along with changes to make the national political parties more disciplined, cohesive and responsible. Yet it is plausible to argue that such changes if effected would restrict the wide-ranging and open public debate that was and is characteristic of most operations of the American political system at the national level.

The structural and public-debate requirements of accountability are not easy to reconcile and are perhaps in specific circumstances irreconcilable. As we shall see, one of the most plausible defences of governmental secrecy is that if elected officials are to be held accountable they must be able to seek advice from within the government and that the maintenance of these lines of hierarchical authority requires that this process of information-sharing be carried on in the context of confidentiality.

7 pp. 237-240.

The Nature, Screening and Distribution of Information about Government

It is almost trite to say that there is an increasing trend toward public policy being based on complex and often esoteric information. In contrast with recent policies to build pipelines in the Canadian North, Sir John A. Macdonald and his colleagues proceeded with the CPR unencumbered with cost-benefit analyses, environmental-impact studies and refined economic projections of the consequences of the project for the Canadian balance-of-payments in the three decades ahead. The changing nature of what policy-makers regard as relevant information shapes a very large number of important political relations. Cabinet ministers are required to decide on and subsequently defend policies based on information that they understand in only a rough and superficial way. In many important areas of governmental activity groupings of experts proceed almost as they wish -- although on careful examination we find that their actions are largely determined by the implicit value-premises of their respective professions rather than scientific considerations. Increasingly, concerned citizens and groups of citizens can enter into public debate with hope of being taken seriously only if they have the capacity and the resources to speak in a sophisticated way; while one person's views may be about as good as another's on the question of raising the drinking age, the same cannot be said about policies on the

law of the sea, and while a century ago Canadians could and did fight about the tariff largely on the basis of their divergent values and interests, today a participant in this debate must master at least the elements of the voluminous and often esoteric research about the matter. Moreover, these newer kinds of information are costly to acquire and the possession of them and the capacity to use them confer substantial advantages on governmental and non-governmental actors with such resources.

A less obvious complication of the "information revolution" is that most persons in the western democracies -- those well-informed and those less so -- lack the capacity to think about the information at their disposal in any coherent way. In part this can be explained in terms of the relative absence of ideological commitment and ideological debate, and the view that is particularly widespread in English-speaking countries that this is a good thing. Christian Bay has said this:

> "In appearance the public's access to knowledge is well looked after in our society, with the newspapers bulkier than ever, the magazines sleeker, and the color TV sets brighter year by year. Facts are available in overflow. What is rarely available to most citizens are coherent contexts for the information they receive, let alone alternate visions of how our society, or the world, ought to be organized. Only 'extremists' discuss such issues and most people are effectively vaccinated against ideas and persons that the media associate with 'extremism'." [8]

8 "Access to Political Knowledge as a Human Right", in Galnoor, op cit, p. 31

Ideology, Bay's "coherent context", is essentially the combination of an explanation of why society is as it is with an imperative for either changing or sustaining that state of affairs. Some social scientists claim that the commitment to any ideology diminishes our ability to think clearly and act rationally in respect to society. The contrary view is that considering each particular situation "on its merits" is itself an implicit ideology -- and one which is inherently supportive of the existing distribution of power and privilege. However we come down in this debate, it is undeniable that ideology filters and makes into a more coherent pattern the information we acquire about the social world -- although it can plausibly be argued that we pay a high price for such coherence. Without such an ideological filter we experience almost insuperable difficulties in making sense of the information we have and in deciding what kinds of information we need. And in this confusion those who control the access to information can and do use this power for their own advantage.

In their recent book Political Parties in Canada, Conrad Winn and John McMenemey make a highly original argument that major elements of public policy in this country are as they are because Canadians do not debate and decide their common affairs within the context

of coherent evaluations of the scope and nature of government activity.[9] There are significant differences among the political parties in terms of their styles, policy and ideological commitments and the elements of the electorate which support them. Yet the policy "outputs" of governments of different partisan complexions appear not to reflect these variations -- to take a crucial example, CCF-NDP governments in the western provinces did not have expenditure policies which were significantly more redistributive than that of administrations in these provinces which were ideologically committed to private enterprise. The media come in for heavy criticism; costs are controlled through a heavy reliance on American sources and in starving the research function. Thus, "Because the media fail to interpret events and policies for the public, the public is left unequipped to pass judgement"[10] -- and the "public" here includes not only private citizens but also parliamentarians who themselves rely heavily on the media. Winn and McMenemey are even more severe on the political parties. Like the media, the parties devote few resources to serious research and debate among parties seldom reflects coherent approaches based on divergent ideologies and policy commitments. Thus in Canada public discussion is seldom

9 McGraw-Hill Ryerson, Toronto, 1976, Chapter 15.

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based on considerations of who gains and who loses by actual and projected policies. This has brought about "a large, growing public sector accompanied by an unequal distribution of income and wealth." This evaluation is given:

> "From intellectual weakness and sometimes from electoral self-interest as well, both the left and the right have failed to set the parameters or criteria by which the growth of the public sector is to be assessed. Thus, the civil service has been free to satisfy the sometimes indiscriminate public demand for government services and bureaucratic desires for empire-building. The left has been content to accept government intervention on the assumption that government intervention somehow assures social equality. The right has been prepared to set aside its predilections against government activity in the knowledge that its natural constituency, the middle and upper strata, is confident that it can receive a sizeable share of government beneficence." [11]

The information revolution and our ideological confusion has led to a situation in which the lines between the political and non-political are confused. A political decision is one which is based on considerations other than those derived from law or settled policy or from the imperatives of what are recognized as the appropriate kinds of expertise. At the extremes, it is not difficult to distinguish the non-political from the political. One can compare, for example, the appointment of a clerk or driver in the public service with the advice given by the Canadian cabinet to Her Majesty the Queen on the choice of the next Governor-General. In the former case the requirements of the position are clearly specified, the ability of applicants to perform these duties can

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be fairly accurately assessed through their previous training and experience along with reliable tests administered by the appointing agency and the authorities are precluded by law from taking into account such factors as sex, religion, ethnic background and so on. So far as the choice of a Governor-General is concerned, all the opposite factors prevail and there are no rules determining how conflicting considerations should be weighted -- the relative merits, for example, of being able to perform the ceremonial functions of the office with dignity and aplomb as against the judgement that in a constitutional crisis the person under discussion could not be relied upon to act appropriately.

In many of the crucial areas of public policy the distinction between the political and the non-political is unclear -- for example, in tariff policies, city planning, the planning of energy installations, correctional measures and so on. Under such circumstances it is of little help to rely on the aphorisms that the expert should be on tap rather than on top and that war is too important to be left to the generals. Despite the wisdom of these statements, governments are ill-advised to get involved in military conflicts without the support of their best strategists and it is imprudent for correctional policies to be designed without the benefit of what criminologists have found out. On the

other hand, it is the almost inherent disposition of experts to use the specialized information of their professions to restrict the realm of political decision. In Karl Mannheim's terms the bureaucrat is motivated to reduce the political to the administrative.[12] To the extent that the experts are successful in this they become non-accountable, or perhaps more correctly they are accountable only to their professional peers rather than to the elected politicians and through these to the public. The experts of course assert, at least in parliamentary regimes of the British type, that they are no more than servants of and advisers to their elected political masters. In many circumstances this must be recognized as no more than the perpetuation by the bureaucrats of a self-justifying and self-protective myth.

In general then, freedom of information policy as it is commonly understood has serious limitations in enhancing the quality of public debate and in making governments more effectively accountable to the governed.

Information policy is directly related to the distribution of information within the political community -- and of course who controls this distribution and to what ends. Plamenatz has

12 Ideology and Utopia, Harvest Book Edition, Harcourt, Brace, New York, 1957 (?), p. 118.

delineated the problem perceptively:

> "There are not two stores of politically relevant information, a larger one shared by the professionals, the whole-time leaders and persuaders, and a smaller one shared by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible, and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism." [13]

Inevitably the distribution of information among various individuals and groups within the political community will be very unequal. However that elastic term "information" is used, such persons as the Premier of Ontario, the Deputy Attorney-General and the senior journalist covering Queen's Park for the Globe and Mail will have significantly more knowledge about the government of the province than most citizens have the time, desire or perhaps talents to acquire -- and those influentials could not carry out their responsibilities effectively if it were otherwise.

Critics of the distribution of information about government usually argue from the situation of either the relatively uninvolved mass public or of those groups most knowledgeable about public affairs and most aggressive in their pursuit of information. It is essential to keep the situations of these two groups distinct in

13 pp. 178-179, Emphasis in text.

considering public policies toward information and in evaluating how changes would affect the needs and interests of each. For example, it has been argued that in the immediate sense at least the major beneficiaries of recent American freedom of information legislation have not been disadvantaged persons and groups as was hoped for by the more idealistic sponsors of such measures but rather corporations seeking information about the affairs of their business competitors. Neither have the reforms in the United States led in the short run at least to a mass citizenry which is significantly more informed about political matters.

The major concern of the Task Force on Government Information which reported to the Prime Minister of Canada in 1969 was that the federal government was failing to communicate effectively with the public, or more accurately with the special publics into which the country is divided.[14] Sophisticated research demonstrated that very large numbers of citizens were ignorant of the elementary elements of the Canadian political system which the researchers and members of the Task Force thought they should know. However, the Report and the studies published under its auspices did not examine the various roles of the citizen as the recipient of government benefits, as taxpayer, as the subject of government regulation and as participant or potential participant

14 Report, Queen's Printer, Ottawa.

in the political process and how the deficiencies in his political knowledge and/or the information about government available to him frustrated him in any or all of these roles -- for example, there was great consternation that many voters were ignorant of the distribution of powers among the three levels of government without any analysis of why this was a matter of such crucial concern.[15] The general solution of the Task Force was that the federal government should coordinate its various activities in the field of information and upgrade these activities both by increasing the resources expended on them and by enhancing the influence of those elements of government involved in communicating with the public. Although there was criticism of government secrecy, it could hardly be claimed that this was a major factor in the public ignorance of political matters about which the Task Force was most exercised.

The access-to-information issue as it is debated in the late 1970s is less focused than was the case a decade ago on the needs of the mass public and on increasing citizen particpation in public affairs and is more concerned with political accountability and the availability of information to relatively privileged groups -- opposition members of legislatures, scholars, the media, representatives of interest groups. These are the political actors

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who are most frustrated by the unavailability of certain kinds of information and who have most to gain from more openness. It is realistic to recognize that freedom-of-information measures may in some circumstances make society even more inegalitarian than it now is. There are powerful economic and financial interests -- almost all of whom carry on their own affairs in relative secrecy -- who have urgent concerns to discover the directions in which governments are proceeding in considering future policies. Certainly after the publication of the Report of the Royal Commission on Taxation in 1966 the opening up of the process of debate and public participation by the federal government resulted in the bold proposals for tax reform made by the Commission being almost wholly emasculated as a result of the pressures of business interests concerned about retaining their privileges,[16] and it is plausible to assume that a more equitable tax system might have been brought into being had the government narrowed the opportunitites for participation. On the other hand, from Magna Carta onward reforms originally won on behalf of the relatively privileged have subsequently been used to further the interests of those in less privileged circumstances. In the immediate circumstances of contemporary democracy, political accountability requires the strengthening of the power of non-governmental as

16 For an account of this see A. D. Doerr "The Role of White Papers" in G. Bruce Doern and Peter Aucoin, Editors, The Structure of Policy-Making in Canada, Macmillan of Canada, Toronto, 1971, pp. 187-197.

against governmental elites and enhanced access to public information is a contribution to this end.

It is misleading and superficial to believe that in modern democracies there is a clear-cut distinction between public information accessible to anyone who wants it and information in the exclusive possession of governments. The actual situation is a good deal more complex.[17] The relation between governments on the one hand and representatives of the media and of interest groups on the other is characteristically made up of collaborative and adversarial elements and in these interactions information not available to the wider public is shared in both directions. In these consultations information of a "factual" kind is often shared -- statistics and the results of scientific research, for example -- but what is usually more important to the participants is the mutual exploration of the evaluations and intentions of the organizations for which such representatives speak. To be more specific, an astute lobbyist may be primarily concerned with assessing in a particular context whether the government is weakening in its adherence to a course of action to which it was formerly committed and an elected or appointed official of government is concerned to discover the amount of opposition to

17 See the excellent analytical essay by Itzak Galnoor "The Information Marketplace" in Galnoor, op cit, pp. 77-92. Also see Richard Rose "The Imperfect Market for Information" in People in Politics, Basic Books, New York, 1970, pp. 121-145.

a projected public policy will be forthcoming from the interests most directly affected by that policy. In these interactions, implicit and sometimes explicit bargains with significant consequences for the wider community are often struck. In principle at least, the power of governments to make information available or to withhold it can be narrowed by legislation with appropriate enforcement clauses. What is a good deal more difficult is to regulate by law and to make more open the informal pattern of relations by which there is a mutual sharing of information between governments and certain individuals and groups outside government, most of these latter selected by governments themselves. There is a good deal of informed opinion in Canada which calls for even more consultation between representatives of the various elite groups, and in particular, there are currents which assert the needs for a better understanding between business and government. This kind of consultation is almost by its nature best carried on at least in part in a confidential context and such a requirement appears to conflict with the demand for more open government.

It is also too simple to fail to realize the importance of the control over information in the relations of the political actors within government and of the consequences of these intragovernmental interactions for the scope and nature of governmental activity. For the most part we tend to attribute

the growth of the public sector to demands originating from outside government. However, what Samuel H. Beer of Harvard University has written about the United States seems broadly applicable to the other western democracies:

> "The programs of the Great Society ... were rarely initiated by the demands of voters, or the advocacy of pressure groups or political parties. On the contrary, in the fields of health, housing, urban renewal, highways, welfare, education, and poverty, it was in very many cases people in government services, acting on the basis of specialized and technical knowledge, who conceived the new programs, initially urged them on the attention of the president and Congress and indeed went on to them through to enactment." [18]

It is, to repeat, important to realize the consequences of the power over information in these intragovernmental relations. In the questioning of the power of central agencies such as the PMO and the Federal-Provincial Relations Office and operating agencies of the federal government, Richard Schultz has pointed out the significance of the discretion of the latter in providing the former with sparse and inadequate and sometimes biased information or, alternatively, of flooding the generalists in the central agencies with voluminous quantities of technical information.[19]

18 "Political Overload and Federalism", X Polity, Fall 1977, p. 11.

19 "Prime Ministerial Government, Central Agencies, and Operating Departments: Towards a More Realistic Analysis" in Thomas A. Hocken, Editor, Apex of Power: The Prime Minister and Political Leadership in Canada, Second Edition, Prentice-Hall of Canada, Scarborough, 1977, pp. 229-236.

D. G. Hartle has analyzed the "expenditure budgetary process" in Ottawa by which public funds are allocated and concluded, "The power and influence of the bureaucracy over the budget rests more in the suppression of information, particularly about alternatives, than its ability to push through changes that ministers do not like."[20]

Public Debate, Accountability and the Democratic Order

In Plamenatz's terms, an essential condition of democracy is that "competitors for power, influence and public support are exposed to relevant and searching criticism". Thus, information must be so distributed that public debate is not a "dialogue of the deaf" between those who don't know and those who won't tell.

One of the least-understood aspects of modern democracy is the process by which the public agenda is set, by which governments and the articulate publics are concerned with particular matters rather than others. Governments themselves control this agenda to only a limited degree and Robert Jackson and Michael Atkinson

20 A Theory of the Expenditure Budgetary Process, Ontario Economic Council, Toronto, 1976, p. 95.

have pointed out in their study of the legislative process in Canada that a very large amount of policy-making is a reactive response to short-run contingencies.[21] Sometimes of course, the public agenda is set by somewhat dramatic events -- conditions in international markets cause the shortage of a vital commodity, the crash of an aircraft precipitates a debate on air safety, the economy of a city is threatened by the decision of the major employer to close down its operations. Yet, in other cases the rise and fall of focuses of public concern cannot be so explained. How is it that the extent of the foreign ownership of the Canadian economy has become almost a non-issue while five years ago it was being so vigorously debated? Why is it that governments and the articulate publics are now so concerned with the abuse of alcohol and are willing to consider seriously restrictions in its availability and promotion, whereas only a very short time ago these were concerns of only those regarded as cranks? Anthony Downs has postulated an "issue-attention cycle" in which public interest develops in a particular matter, governments take certain steps to deal with it and then public attention gradually subsides -- characteristically without the action taken having been fully

21 The Canadian Legislative System, Macmillan of Canada, Toronto, 1974, p. 61.

effective.[22] Yet this formulation, while suggestive, does not take us very far in explaining how and why issues get on the public agenda in the first place.

Debate about public policy in western democracies is a sporadic and uncertain business. Some governmental measures are adopted only after widespread discussion and others are not. For example, such discussion preceded the enactment by the Parliament of Canada of the Official Languages Act in 1969, while in respect to crucial decisions on the economic development of the North at about the same time, debate was, according to E.J. Dosman's account, almost entirely confined to secret interactions within the federal government and between federal officials and representatives of a few major business corporations.[23] Further, most of the debate about public policy takes place in sensational terms -- a horse is discovered on the payroll of the Petawawa Army Camp (as happened about 25 years ago), a party hack is appointed to a well-paid position

22 "Up and Down with Ecology -- the 'Issue Attention' Cycle", 28 The Public Interest, Summer 1972, pp. 38-50.

23 The National Interest: The Politics of Northern Development, 1968-1975, McClelland and Stewart, Toronto, 1975.

for which he has few obvious qualifications, it is revealed that a guard in a correctional institution has abused one of the prisoners. The media and the opposition parties are adept in exploiting such issues and much of the pressure for enhanced access to government information may arise from their desire to increase this capacity to expose individual instances of governmental mismanagement, inhumanity or corruption.

It is plausible to decry the superficiality and sensationalism of much of the public debate about public policy. Certainly the exposés of the mass media and the opposition parties often ignore more fundamental questions about the equity, efficiency and effectiveness of government policies. Certainly it sometimes seems perverse to subject a minister to criticism for an individual act of mismanagement in his department where the elected official could not reasonably have been supposed to have the power to prevent such an occurrence.

Yet we must preserve a balance here. The exposure of individual cases can reveal broader patterns of government ineptitude or wrongdoing. The uncertainties of the environments in which they work encourage elected and appointed officials to be wary that their conduct may be exposed to public criticism and public debate.

At any rate the existing organization of the mass media and of the opposition parties and the interests of those organizations makes it unrealistic to expect them to perform the fundamental criticism of public policy in any effective way.

In general terms, Plamenatz's requirement of "relevant and searching criticism" of government must rest to a large extent on persons and groups with specialized knowledge and the capacity to bring this knowledge to bear on particular aspects of public policy -- scholars, research institutes, professional journals and elite publications with a more general audience, professional associations, public interest groups and so on. It is essential that these both be independent of government and that the kind of information be available to them to make their evaluations other than capricious. While in the structural sense governments are not responsible to such groupings, the accountability criterion can be met only if the latter are capable and strong.

One of the more crucial issues joining information policy and public discussion is whether public debate should take place only <u>after</u> governments have fixed on a settled course of action in respect to particular matters or, conversely, whether debate should proceed as the public authorities are deciding on public

policies. In countries operating under British-type parliamentary institutions this is particularly crucial in respect to the taxation budget. A certain amount of secrecy here is inevitable to prevent certain individuals and groups from taking advantage of their fellow citizens and perhaps the public treasury by way of their prior knowledge of forthcoming changes in taxation policies. Also in many jurisdictions the treasurer or his counterpart in presenting his budget makes public an amount of statistical and other information compatible with a relatively informed post hoc debate. Yet there is a strong case for measures to open up the budgetary process at the stage when decisions are in the process of being made.[24] One of the most plausible defences of secrecy in the operations of government is that those responsible for public policy must be allowed to seek advice from whatever sources they choose, inside or outside government itself, and that the acquiring and the weighing of such advice must take place within the context of confidentiality. Yet the result of this is sometimes if not usually that dialogue between government and the public is frustrated because the latter know only the decisions made by government rather than the information and premises on which these decisions are based. In the past generation

24 See the recent brief of the Canadian Tax Foundation directed toward making the budgetary process more open "The Tax Legislative Process", Canadian Tax Journal, March-April 1978, pp. 157-182.

more than before governments have attempted to meet this kind of deficiency by the publication of command papers, white papers, green papers, etc., in the period prior to firm decisions being made [25] and there is no doubt that this device has contributed to the process of informed debate and hence to accountability.

Access to Public Information as a Human Right

In much of the current debate access to information about government is asserted as a human right. This is a somewhat recent assertion and until the last generation or so governments were for the most part unchallenged in the exercise of their power to determine the flow of information to the public about public business.

If we are engaged in analysis rather than exhortation it is perhaps better to use the term "human claim" or even "highly-preferred human claim" rather than "human right". The assertion of a "right" has an absolute and unconditional connotation which masks our real activity in ordering and re-ordering a complex system of claims which are often in competition and sometimes wholly irreconcilable.

25 See Doerr in White Papers op. cit. Just after this Chapter was written Prime Minister Trudeau announced that his government's specific proposals for constitutional reform -- as these were within federal jurisdiction -- would be embodied in a bill which after first reading in Parliament would be subjected to widespread discussion with the provincial governments and the public.

So far as access to public information is concerned, this "right" is most plausibly defended not in terms of persons satisfying their curiosities but so that they may individually or collectively exercise other "rights" -- perhaps to make governments accountable, to be able to defend themselves when the public authorities subject them to deprivations, to organize themselves to displace incumbents of public office, to discover how they can take advantage of public benefits under law available to them and so on.

Much of the access-to-information debate as it derives from the United States is based on the theory of popular sovereignty. According to this general theory, which in its American variant derives from John Locke, the people are sovereign and governments are repositories of power delegated from the people. Thus government secrecy is a denial of this responsibility by those to whom the power of government is delegated.

A contrary formulation of the source and nature of sovereignty views sovereignty as an attribute of those who wield the decisive powers of government.[26] Within British-type parliamentary institutions this means the Crown in Parliament, most crucially ministers and

26 J.A.C. Griffith "Government Secrecy in the United Kingdom, in None of Your Business". Government Secrecy in America, Norman Dorsen and Stephen Gellers, Editors, Viking Press, N.Y., 1974, pp. 333-334.

public servants with the latter working under ministerial direction and control. Walter Lippmann's The Public Philosophy published in 1955 asserts that the fundamental political relationship in any society is between the executive as "... the active power in the state, the asking and proposing power" and the governed, the latter represented in the legislature which is " ... the consenting power, the petitioning, the approving and the criticizing, the accepting and the refusing power."[27] Lippman speaks of the complementary nature of the relationship between government and the governed:

> "The government must be able to govern and the citizens must be represented in order that they shall not be oppressed. The health of the system depends upon the relationship between those two powers. If either absorbs or destroys the function of the other, the constitution is deranged."[28]

In these terms then, the citizen has two rights. One is to be governed effectively and the other is to be so governed that he is not "oppressed". Much of the debate about secrecy in government involves disagreement about how these claims are to be weighted when one conflicts or appears to conflict with the other.

There is another point which deserves attention. As generally formulated, popular sovereignty is applied only to government and it is not usually claimed that the power of business corporations

27 Mentor Books, New York, p. 31.

28 op. cit.

or trade unions or churches or other constellations of "private" power are derived from "the people". In fact in the Lockean version of sovereignty the rights of these "private" associations are usually asserted in a somewhat unqualified way. An alternative formulation views the "political" more widely to encompass all the structures of authority in which the individual is enmeshed. The state, what one writer has called "public government", is a rather special kind of authority in its possession of a monopoly of the means of physical coercion and in its recognized ability to impose its decisions on all the persons physically present within its territorial boundaries rather than, as in the case of other organizations, only a part of the population. Yet within the context of this kind of formulation the individual's political rights involve not only his relations with the state but also other associations which control him. In respect of freedom of information, governments in the western democracies are already the most open of the major institutions. For example, a recent study by the Conference Board of Canada on the boards of corporations treats the information issue not in terms of its availability to the general public or shareholders but rather the kinds and amounts of information that the executive officers of incorporated companies should make available to their respective directors.[27] Although the structural and public

27 Canadian Directorship Practices: A Critical Self-Examination, by Susan Peterson assisted by Morris Heath, Ottawa and New York, 1977, pp. 74-79.

debate requirements of accountable democracy are imperfectly met in the western democracies, the power of governments is made much more effectively responsible to the governed than is the case with other large institutions. Thus it is to be hoped that the elevation of the right to public information about government will be accompanied by corresponding pressures to restrict secrecy in the operation of other constellations of organizational power.

Freedom of Information and Public Administration

The analysis of this Chapter has emphasized accountability in the making of generalized public policies with particular attention on the distribution of information between governments and articulate extra-governmental elites. Many persons who are concerned with reducing secrecy in the conduct of government will argue with some plausibility that this is not where the major problems lie, and that at any rate the kind of matters with which I have been preoccupied are not for the most part amenable to regulation by law. Thus, in specific terms, the most crucial information imbalances are not between the government on the one hand and major representatives of business along with university economists on the other in devising taxation policies for the mining industry, but rather between individual citizens under

unfortunate circumstances and public agencies who have the power to give or withhold public assistance.

Our governmental system confers discretion on public officials at all levels -- even the clerk at the information desk of the tax office can choose whether to be helpful to us or to simply quote the law and policemen decide every day whether to charge us with infractions of the rules of the road or let us off with a sermon. Discretionary authority is inevitable but progress in human rights consists in large part in proceduralizing the activities of government, in delineating and making public who has the authority to make particular decisions and the considerations which are deemed relevant to such decisons.

The proceduralization of discretionary authority has occurred more quickly and perhaps has gone further in our universities than in any other of our major institutions. A generation or so ago, Canadian universities operated almost exclusively within an informal and aristocratic ethos and apart perhaps from the decisions to expel a student or faculty member for misconduct, there were few elements of the rule of law built into their operations. The events of a decade ago have changed all that. These developments in significant ways changed the power relationships among the organized elements of the university -- the administration, teaching faculty, support staff and student body. But in my view the more crucial and perhaps lasting changes were in the direction of

making more open and explicit the criteria used by those who exercised power in respect, for example, to the evaluation of student performance, admissions policies, tenure and promotion of faculty and so on. I regard these developments as on the whole desirable in terms of the contribution to the dignity of those who work and study within the university. There have of course been costs in terms of the energies devoted to the devising and implementing of these complex procedures and in erecting legal and procedural barriers to relations which should not be so regularized.

A compelling case can be made that as within universities so within the departments and agencies of government there is the requirement of openness in the procedures by which authority is wielded and the criteria used to make particular decisions. Thus, in his dealings with public institutions the citizen should be entitled to know:

a) Who, in fact, makes the decision about what concerns him.

b) The legal source of that power.

c) The criteria, spelled out as explicitly as it is practical, according to which decisions are made.

d) The factual information deemed relevant to the particular decision.

e) The rationale for the decision.

f) The avenues of appeal against the decision.

A New Yorker cartoon of some years ago portrayed the sign in the outer office of the dean of a university, "Don't ask us why we do it, it's just our policy". Human dignity is incompatible with such arbitrariness.

CHAPTER II

THE CANADIAN CONTEXT

The Franks Committee on governmental secrecy in the United Kingdom said this:

> "In each of the four overseas countries we visited, as in this country, there is a variety of factors affecting openness. Constitutional arrangements, political traditions, and national character, habits and ways of thought, all have their influence. Our examination of the position in five countries, differing from each other in all these respects but each within the broad tradition of western democracy, has confirmed that the law is by no means the most important influence on openness. In some countries it is not even a major one. A particular national law cannot in any event be sensibly assessed apart from the whole national context."[1]

Obviously it is prudent for countries to try to learn from one another's experience in respect to governmental secrecy and other matters. Yet the most difficult aspect of such learning is to develop a sensitive and sophisticated awareness of different "national contexts". For example, Canadians cannot reasonably be expected to place as high a value on openness in government as do Swedes nor are Canadian judges as likely to challenge elected

1 Quote in J.A.C. Griffith "Government Secrecy in the United Kingdom" in None of Your Business: Government Secrecy in America, Norman Dorsen and Stephen Gillers, Editors, Viking Press, N.Y., 1974, p. 329.

officials who withhold government documents as are members of the American judiciary. This Chapter attempts in an inevitably impressionistic way to describe the ideational and institutional context of Canadian government and politics as this context relates to governmental secrecy.

Parliamentary Sovereignty, Elite Accommodation and the Canadian Political System

The Canadian political tradition is based on parliamentary sovereignty rather than popular sovereignty. Frank Underhill pointed out that Canada, in both its English and French elements, was preeminently a country of the seventeenth and nineteenth centuries which had been by-passed by the liberal and egalitarian currents of the Enlightenment, "For this weakness of the Left in Canada, the ultimate explanation would seem to be that we never had an eighteenth century of our own."[2] Another historian, W. L. Morton, has put in another way, "Not life, liberty, and the pursuit of happiness, but peace, order, and good government are what the national government of Canada guarantees."[3] The legitimation of the powers of government along with the limitations on these powers

2 In Search of Canadian Liberalism, Macmillan of Canada, Toronto, 1960, p. 12.

3 The Canadian Identity, Second Edition, University of Toronto Press, 1972, p. 110.

by reference to a theory of popular sovereignty embodied in the American and French Revolutions is thus foreign to the Canadian political experience.

Adherents of popular sovereignty are disposed to regard representative democracy as an inferior though perhaps regrettably necessary alternative to direct democracy. Again this is removed from the dominant Canadian tradition. In the early years of this century currents of direct democracy were very influential in the United States and resulted in the establishment of direct primaries, the amendment of the Constitution to provide for the popular election of United States Senators rather than as before their election by the state legislatures, constitutional protection for home-rule of certain urban areas and the institution of the initiative, referendum and recall. These influences were very weak in Canada and their concrete manifestations were almost entirely confined to the prairie provinces;[4] significantly, in 1919 the Judicial Committee of the Privy Council invalidated the Initiative and Referendum Act of Manitoba on the general grounds that would compel the Lieutenant-Governor of the province to submit a proposed law to the voters and would render this official powerless to prevent the law from coming into effect if approved

4 Elizabeth Chambers, "The Referendum and the Plebiscite" in Norman Ward and Duff Spafford, Editors, Politics in Saskatchewan, Longmans, Toronto, 1968, pp. 59-77.

by a popular majority.[5] There is of course a good deal of public attention on the forthcoming "referendum" in Quebec and to a lesser degree on the legislation before the current Parliament of Canada providing for similar balloting under federal auspices. However, in a technical sense and according to the parliamentary tradition these are "plebiscites" whose results cannot in law bind governments or legislatures.

The preamble to the 1977 enactment by the legislature of Nova Scotia providing for public access to government information[6] relates the information issue to parliamentary government in a very interesting way:

> "Whereas since 1848 the people of the Province of Nova Scotia have had responsible government whereby the members of the House of Assembly and the members of the Executive Council are responsible for their actions to the people who have elected them through regularly held elections;
> And Whereas the people of the Province should be protected against secrecy in respect of the conduct of public business by officials of the Government;
> And Whereas the principles recited herein should be consistent with one another and should operate without contradiction;
> And Whereas these principles can be better maintained by ensuring the people that the Government is operating and by providing the people access to as much information in the hands of the Government as possible without impeding the operations of Government or disclosing personal information pertaining to persons or matters other than the person desiring the information."

Although the Nova Scotia enactment defines access to public

5 1919 (A.C.) 935.

6 Statutes of Nova Scotia, 1977, Chapter 10.

information in relatively narrow terms, the principles enunciated in the preamble are worthy of notice.

First, and in harmony with Walter Lippmann's formulation as discussed in Chapter I, the rationale for enhanced public access to information is that the people be protected against government; second, more access to information is consistent with the operations of responsible government; third, the limits of public access to information are set by the demands of privacy and the expeditious conduct of government business.

The most crucial process of Canadian government is what Robert Presthus has called "elite accommodation".[7] Presthus and others have designated the Canadian variant of elite accommodation as "corporatism" and in a recent discussion, K.J. Rea and J.T. McLeod have said this:

> "What we are asserting, then, is that nonliberal organic corporatism may be a pervasive fact of the Canadian political economy. Our system's organization of power is not merely elitist, but corporatist. Elites interact and attempt to accommodate each other. The various elites often appear to clash, or pretend to clash, but usually maintain a realistic willingness to balance or harmonize their diverse interests and to preserve the interests of the community through collaboration with the state. When our elites perceive they are threatened by external enemies, free trade, foreign competition, foreign investment, class divisions or inflation, the orthodox Canadian response is an organic corporatist response:

7 Robert Presthus, Elite Accommodation in Canadian Politics, Macmillan of Canada, Toronto, 1973.

> to seek the cooperative interaction of various groups; to eschew market norms of liberal competition; to rally around the concept of a unique Canadian community." [8]

My own view is that Rea and McLeod overemphasize the collaborative aspects of inter-elite relations in Canada and neglect their adversarial elements.[9] However, their analysis sheds valuable light on the political system.

It is plausible to argue that elite accommodation in Canada is facilitated by the dominance of bureaucratic traditions and the relative weakness of liberal individualism. S.D. Clark's interpretation is suggestive here: "The Canadian political community was not the creation of a people seeking a distinct national identity. It was the creation rather of certain business, political, religious and cultural interests, seeking the establishment of a monopolistic system of control. Geography, which favoured individual enterprise and limited political interference in the conduct of economic, social and religious affairs over a large part of the continent, favoured on this part of the continent large-scale bureaucratic forms of organization and wider spread intervention by the state ...

8 "Introduction: The Changing Role of Government and the Drift Toward Corporatism" in Rea and McLeod, Editors, Business and Government in Canada: Selected Readings, Second Edition, Methuen of Canada, Toronto, 1976, pp. 339-340.

9 See my "The Non-Economics of Anti-Inflation" in Rea and McLeod, op. cit., pp. 444-448.

The Canadian middle class has grown up, very largely, within a bureaucratic structure of power -- economic, political, ecclesiastical. Typically, the Canadian middle class person has been an office-holder ... Individuals seeking to advance themselves outside the bureaucratic order have tended to a very large extent to cross the border into the United States."[10]

I have said in Chapter I than in the contemporary context public information cannot be clearly divided between that in the exclusive possession of government and that freely available to any citizen who wants it; there is a complex process of the mutual sharing of information between governments and privileged extra-governmental elites. There is every reason to believe in Canada that Max Weber's classic analysis of secrecy are accurate: "Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of 'secret sessions': in so far as it can, it hides its knowledge and action from criticism ... The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely

10 "Canada and the American Value System" in S.D. Clark, The Developing Canadian Community, University of Toronto Press, 1968, pp. 233-234. Clark's later writings, however, emphasize the present challenges to these kind of relationships. See his Canadian Society in Historical Perspective, McGraw-Hill Ryerson, Toronto, particularly Chapters II and III.

functional interests make for secrecy."[11]

Executive Dominance

In his recent book Government in Canada, Thomas A. Hockin speaks of the "collective central energizing executive as the key engine of the [Canadian] state."[12] Hockin is here speaking of both federal and provincial levels of government. He relates executive dominance to what he regards as the inherent conservatism of the Canadian political tradition -- a conservatism manifested not only in schemes of national integration but also in counteracting influences to preserve local and provincial communities.

Executive dominance at the federal level can be illustrated with reference to two extant enactments.

Section 3(1) of the War Measures Act states "The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion, or insurrection deem necessary or advisable for the security, defence, peace, order

11 "Bureacracy" in From Max Weber: Essays in Sociology, Translated, Edited and with an Introduction by H.H. Gerth and C. Wright Mills, Oxford University Press, New York, 1946, p. 233.

12 McGraw-Hill Ryerson, Toronto, 1976, p. 7.

and welfare of Canada." Among the enumerated powers conferred on the executive under this general grant of power is the authority to undertake "censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication." Thus the Governor in Council may by proclamation and subsequent regulation override the normal law-making powers of Parliament and the provincial legislatures. Section (2) of the Act enacts in part "The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated." Despite the disposition of the courts in the British parliamentary tradition to invalidate such clauses barring judicial review of legislative or executive action, it is extremely unlikely that in any conceivable circumstances the judiciary would challenge the issuance of a proclamation under the Act. And as we have been aware since the fall of 1970, the War Measures Act can be and has been employed in the context of domestic disturbances as well as international hostilities.

Section 41 of the Federal Court Act enacted by the Parliament of Canada in 1970 declares:

> "(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties subject to such

> restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that public interest in the proper administration of justice outweighs the importance of the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court."

It appears that Section 41(2) was intended by the government to prevent Canadian courts from qualifying Crown privilege as had been done in 1968 by the House of Lords in Conway v. Rimmer.[13] The effect of this case was to challenge the hitherto unrestricted power of Ministers to refuse to produce documents on the rationale that otherwise there would not be "freedom and candour of information with and within the public service". The practical results were that Minister's affidavits would not be automatically accepted by the judiciary in the future and that the courts had the authority to inspect requested documents in camera.

Apart from such specific legislative enactments as I have quoted, executive dominance is embodied in the settled constitutional conventions of jurisdictions within the British parliamentary tradition. According to one of the most fundamental of these rules -- embodied so far as the Parliament of Canada is concerned in Section 54 of the British North America Act -- all bills for the raising of taxes or

13 [1968] A.C. 910.

the appropriation of public moneys must be brought before the legislature by the executive. Money bills aside, the government almost monopolizes the function of framing legislation and in the current Ontario controversy over French-language rights, there is no challenge to the position that even under the conditions of a minority administration the government retains the exclusive prerogative of bringing forward legislation on important matters.

The last few years have seen a great deal of emphasis on efforts to reorganize the executive to make this side of government more efficient and effective. In the federal government there were the reforms recommended by the Glassco Commission and in Ontario those of the Committee on Government Productivity. New and sophisticated managerial techniques have been introduced with the objectives of making priority-setting more deliberate and rational and of measuring performance -- PPBS, performance budgeting, Management by Objectives, various uses of cost-benefit analysis, super ministries, the use of cabinet committees, the rationalization of the operations of cabinets and so on.

As J.E. Hodgetts has pointed out, recent movements toward executive reorganization in Canada have been directed towards enhancing the efficiency and effectiveness of government and have had little concern with accountability.[14] A minor caveat to Hodgetts'

14 Bureaucratic Initiatives, Citizen Involvement, and the Quest for Administrative Accountability", Transactions of the Royal Society of Canada, 1974, pp. 227-236.

observation is that in part the impetus for executive reorganization has arisen from the impulses of first ministers and their cabinet colleagues to strengthen their control over the appointed bureaucracy and that this is a necessary though not sufficient condition for making governments accountable to legislatures and the wider public.[15] There have of course been developments to enhance accountability -- the establishment of the office of ombudsman in most of the provinces and of specialized ombudsmen at the federal level (Commissioner of Official Languages, Human Rights Commissioner, Commissioner of Privacy, etc.), the increasing effectiveness of select and standing committees in legislatures, enhanced research facilities for private members and opposition parties supported by public monies, various improvements in the facilities available to private members in servicing their constituencies, more and better information services and so on. However, no sophisticated observer would claim that these and other such devices taken together make those who exercise the executive powers of government accountable, and in several recent speeches the Honourable Robert L. Stanfield has expressed the pessimistic view that the scope of activity undertaken by modern governments makes responsibility at least as we have traditionally understood it impossible to enforce.[16]

15 For the federal level see G. Bruce Doern "Recent Changes in the Philosophy of Policy-Making in Canada" II Canadian Journal of Political Science, June 1971, pp. 243-264.

16 "Ottawa's Power Upsets System", The Globe and Mail, Toronto, February 8, 1977, p. 7.

In countries with British-type parliamentary institutions, some of the most crucial issues of the debate about government secrecy revolve about the conventions of cabinet and ministerial responsibility and the implications of these conventions for the circumstances in which information about government are to be made public. Stated simply, the cabinet is collectively responsible to the legislature and through the legislature to the wider public for all government policies and individual ministers are similarly responsible for all acts taken in their respective departments according to the authority conferred on such ministers by law. It is argued that this sytem of cabinet/ministerial responsibility imposes two restrictions on the access of the public to information about government. First, it is claimed that discussions about actual or projected policies within government -- discussions involving ministers alone or civil servants alone or ministers and civil servants -- should not be made public. Second, it is asserted that it would be contradictory to ministerial/cabinet responsibility to charge the judiciary with overriding the judgements of ministers or cabinets about making public specific government documents.

It has now become fashionable to denigrate the "myth" of ministerial responsibility. It is asserted that under modern conditions ministers cannot be aware of all the actions taken in their name. Increasingly, legislation confers explicit duties on appointed officials and agencies. We have made little progress in reconciling the conflicting demands for flexibility in the activities of government

corporations operating within a commercial context and the "ultimate" responsibility of ministers and governments for these agencies. There are also unresolved problems in the review by cabinets and ministers of the decisions of quasi-judicial boards and commissions. And we have not even begun to relate ministerial/cabinet responsibility to the new kind of joint private-public venture which has developed in Canada in this decade -- what does responsibility mean, for example, in the context of Syncrude where there is the involvement of several private corporations, the governments of Canada, Alberta and Ontario and several federal and provincial regulatory agencies? On the basis of these and other criticisms ministerial responsibility is claimed to be a transparently fake myth which serves the interests of the vast appointed bureaucracy and which shields the bureaucracy from being held accountable for the exercise of the decisive power it wields.

Professor Kenneth Kernaghan is undertaking a comprehensive study for the Commission of the current state of ministerial responsibility in Canada and while I do not wish to anticipate his analysis, it seems appropriate for me to state my own conclusions briefly. These are that if one rejects entirely the traditional conventions it is incumbent to evolve new rules to govern some of the most important relations in our political system -- relations between appointed and elected officials, between ministers and legislatures, between governments and the governed. So far as I have read the debate, critics of the conventional doctrines have not formulated alternative

rules to be applied to these relations -- at least none which would not involve a radical break with parliamentary traditions.

Defenders of secrecy in the operations of government often refer to the overriding need for preserving the neutrality and anonymity of civil servants. It is important to realize that these terms are used in a technical and somewhat restricted sense. Ministers expect and ordinarily receive the loyalty of the civil servants of their departments; these officials are not neutral as between government and opposition or between their departments, ministers and other interests within the government. Nor does neutrality mean that civil servants do not have strong preferences about the substance of public policy and the procedures by which policies are devised and implemented. What neutrality does mean is that the relation between minister and civil servant is not that of patron and client, the minister is not responsible for the appointed official's tenure, he has few if any powers to discipline him and, by rules of conduct which are conventionally accepted rather than explicit, the civil servant keeps enough distance both from the minister as a person and from the more crassly partisan aspects of public affairs that he can transfer the same kind of loyalty to another "political master" either of the same partisan complexion or otherwise. In terms of policy, neutrality means that civil servants will execute government measures as effectively and efficiently as they can despite their private doubts about such measures and even their opposition to them prior to such policies being adopted. Anonymity

is also used in a restricted sense. Civil servants are not anonymous in the sense that members of the covert element of the Central Intelligence Agency are anonymous; their names and offices appear in government directories, there is evidence that they are prime targets of representatives of interest groups[17] and increasingly civil servants appear in public to explain and defend government policies. What anonymity does mean is elected executive officials rather than appointed persons are made answerable for the conduct of government.

The Judiciary in Canada

Many of the recent proposals for enhanced access to public information in Canada recommend final judicial determination of ministerial and governmental decisions to withhold information. To the extent that such proposals were embodied in law and that courts did in fact overrule the elected executive authorities, there would be a significant change in the relations between courts and governments. It thus seems appropriate to make a brief and inevitably impressionistic analysis of the place of the judiciary in the Canadian governmental system.

17 Presthus, op. cit. Of the 430 interest groups about which information was secured, 178 ranked the civil service as its "primary general target" in seeking to influence government policies. Of the 91 interest groups classified as "Business", 51 saw the civil service as the primary target and another 25 the cabinet.

There can be little doubt of the relatively high regard in which the Canadian judiciary is held. Working from 1951 census data, Bernard R. Blishen in an article published in 1958, ranked male judges first of 343 groupings on an "occupational class scale" combining name, sex and years of schooling; Blishen pointed out that there was a high positive correlation between his rankings and rankings of the prestige of various occupations.[18] David Lewis in the context of the reaction of certain Quebec courts to strikes in the provincial public service in 1972 suggested that the judiciary was less than impartial in such matters and was subjected to remarkably vigorous criticism in Parliament and the mass media. Until recently at least, the judicial system in Canada has for the most part escaped the criticism undergone by other governmental institutions.

The high regard in which Canadians hold judges is manifested by the practice of assigning extra-judicial functions to them.[19] In fact, there seems to be a disposition to regard incumbents of judicial office as having a monopoly of the virtues of judiciousness

18 "The Construction and Use of an Occupational Class Scale" in Bernard R. Blishen, Frank E. Jones, Kaspar D. Naegele and John Porter, Editors, Canadian Society, Macmillian of Canada, Toronto, 1961, pp. 477-485.

19 "Extra-Judicial Duties", R. MacGregor Dawson, The Government of Canada, Fifth Edition, Revised by Norman Ward, University of Toronto Press, 1970, pp. 405-408 and "Extra-Judicial Employment of Judicial Personnel", Royal Commission Inquiry into Civil Rights, Queen's Printer, Ontario, 1968, Volume 2, Part II, Section 3.

and impartiality even where the evidence to be weighed is other than that recognized as such by the courts of law. Thus it is common to assign judges to commissions or other inquiries into matters involving broad social and economic policies, e.g. the Berger and Hartt Commissions related to public policies in different parts of the North. Although the federal government and the governments of most of the provinces have recently put some restraints on this practice, judges in the past have often served in conciliation and arbitration proceedings in labour disputes. One might have expected that judicial independence would decree that judges be uninvolved in such matters, but under extant federal law the Chairman of each of the 10 provincial Electoral Boundaries Commissions established to redraw constituency boundaries after each decennial census is appointed by the Chief Justice of the province from "among the judges of the court over which he presides."[20]

Peter Russell has perceptively suggested that the legitimacy of the role of the courts in the Canadian system of government has been perpetuated by a "very unrealistic image of the judicial role"[21]

20 The most careful student of Canadian electoral administration, Terence H. Qualter, has this to say of the federal procedure "The insistence on involving a judge ... is peculiarly Canadian and it seems rather difficult to understand the rationale for it", The Election Process in Canada, McGraw-Hill of Canada, Toronto, 1970, p. 101.

21 "Judicial Power in Canada's Political Culture" in M.L. Friedland, Editor, Courts and Trials: A Multidisciplinary Approach, University of Toronto Press, 1975, p. 79.

which perceived that "judicial decisions are ... mechanically deduced from previously established rules of law."[22] Thus, according to this view, the judges play roles which are essentially technical in nature like those of surgeons or aircraft pilots. However, these sources of legitimacy are now being rapidly eroded. Students of law and government emphasize the very considerable degree of discretion that courts exercise in the review of the constitution -- and among the articulate public there is an increasing recognition of this power. Until now we have lacked empirical studies of the operations of the lower courts in the judicial hierarchy but the studies we have make plain the discretion exercised by the judges and magistrates of such courts.[23] The curricula of law schools are changing in the directions of integrating law with other social sciences and of a new jurisprudence which emphasizes the "creative" role of lawyers and judges in shaping human relationships.[24] In these and other ways the perception of judicial decision-making as a purely technical and mechanical function has been weakened.

22 p. 77.

23 John Hogarth, Sentencing as a Human Process, Toronto, 1971, and M.L. Friedland, "Magistrate's Courts: Functioning and Facilities", Criminal Law Quarterly, 1968, pp. 43-64.

24 For example, the underlying philosophy of Canadian Constitutional Law in a Modern Perspective, Edited by J. Noel Lyon and Ronald G. Atkey, University of Toronto Press, 1970.

There have been contradictory forces at work in determining the role of the courts in the Canadian governmental system. As in other western democracies, there are long-term developments to restrict the scope of judicial decision -- the creation of administrative boards and tribunals; privative clauses in legislation attempting to forestall judicial review of the decisions of legislatures, cabinets and executive agencies; some widespread disposition to confer on bodies of experts decisional power over matters where judicial review formerly prevailed. The counter-tendency has been to enhance and to recognize more explicitly as political the role of the courts.

More than at any time in its history of just over a century the jurisdiction, composition and functioning of the Supreme Court of Canada are in the forefront of public debate. Since it displaced the Judicial Committee of the Privy Council as the final appellate body in Canadian constitutional review in 1949, the decisions of the Court have in most cases sustained the legislative powers of Parliament as against the provinces. As a result, the provincial governments have ceased to accept the Supreme Court as neutral arbiter of the constitution. From the Victoria Charter of 1971 onward most proposals for reforming the Canadian constitution have suggested that the provincial governments be involved in the selection of members of the Court and many of the proposals under current discussion recommended the ratification of such appointments by a House of the Federation or House of the Provinces. Such

procedures would inevitably politicize the appointing process, although it seems unlikely that the partisan-political allegiance of potential judges would assume any significant importance. However, what would be taken into account would be the social and jurisprudential philosphy of these persons as expressed in their recorded decisions as members of other courts and their academic writings or speeches and, if the appointments were subject to ratification by a restructured Senate, the accounts they gave of themselves in public hearings of that body or one of its committees.

Another thrust towards the politicization of the judicial process inheres in the current proposals for the "entrenchment" of human rights, including linguistic rights, in a reformed Canadian constitution. Despite the overblown rhetoric about the "enshrining" and "entrenchment" and "guaranteeing" of human rights by such changes, what is really involved is transferring from the legislatures to the courts decisive powers in the definition and ranking of claims on the community. To the extent that this power was aggressively exercised by the courts -- most crucially of course the Supreme Court of Canada -- the judiciary would be in direct conflict with other governmental actors such as legislatures, cabinets, administrative tribunals and so on.

The proposal that judges be given the power to review the decisions of ministers that certain documents or classes of information be kept secret would inevitably contribute to the politicization of

the judicial process. The extent to which it would do so would of course be determined on the scope of such powers and how bold the judges were in challenging the decisions of elected officials in exercising these powers. The appropriateness of such proposals will be discussed in Chapter III.

Federalism

In the past two decades there has been an enormous increase in the amount and intensity of interaction between the federal and provincial governments and among all the provinces and regional groupings of provinces. I have elsewhere described this system of relationships as "executive federalism".[25] In the past decade there have been twenty meetings of the first ministers of the federal and provincial governments and a recent document issued under the name of the Prime Minister asserts that there are about five hundred "formal meetings" of federal and provincial officials each year.[26] Outside the federal-provincial matrix, there has been a vast development of interprovincial relations in the 1970s with some of these involving all the provinces and others such regional groupings as Ontario and Quebec, the Maritime Premiers' Conference

25 Canada in Question: Federalism in the Seventies, Second Edition, McGraw-Hill Ryerson of Canada, Toronto, 1976, Chapter 3.

26 The Right Honourable Pierre Elliott Trudeau, A Time for Action: Toward the Renewal of the Canadian Federation, Ottawa, 1978, p. 14.

and the Conference of Western Premiers. Thus most of the crucial aspects of public policy are debated and resolved within an intergovernmental context. The frequency and importance of intergovernmental relations in Canada make it more difficult to meet what I have designated in Chapter I as the structural and public debate requirements of political accountability. To take a recent example, the Established Programs Financing and Fiscal Arrangements Act of 1977 was the result of a complex series of bargains between Ottawa and the provinces which shaped the future course of Canadian federalism in a fundamental way. Although the Act was in law an enactment of the Parliament of Canada, all eleven governments were in one way or another involved in determining its contents and thus in part responsible for it but there are no institutional devices by which such joint accountability can be enforced. Similarly, Prime Minister Trudeau has defended the very weak controls to monitor prices and incomes after the present legislation expires late this year by reference to provincial opposition to more stringent procedures.

Executive federalism also makes the public debate requirements of accountability difficult to achieve. In part this is a result of the extreme complexity of the process. There is also secrecy; in his Federal-Provincial Diplomacy Richard Simeon has analyzed the relations between the two orders of government through the analytical perspectives developed by scholars of international relations[27] and

27 University of Toronto Press, 1972.

the participants in intergovernmental relations in Canada have adopted some of the procedures of secrecy which normally prevail in international intercourse. However, there is a relatively large amount of information available to the public about these processes and the confidentiality that prevails is usually not very difficult to penetrate by assiduous journalists or even scholars. The proceedings of several recent conferences have been held in public and broadcast over the national television networks in whole or in part. The Intergovernmental Conference Secretariat in Ottawa makes available a large amount of information about these gatherings -- in some case verbatim proceedings, more often the position papers of the various governments and the final communiques of the conferences. Apart from the information made available to the public by the deliberate decisons of these governments, there appear to be no agreed-upon conventions related to confidentiality as prevail in respect to the deliberations of cabinets or other communications within individual governments. On the other hand, one of the most plausible defences of secrecy advanced by particular governments is that much of the information in their possession has been acquired by way of their interactions with other governments and cannot be made public without the latters' consent. When this rationale is combined with the argument that in federal-provincial relations, as in international diplomacy, the effective action of each jurisdiction in pursuing its objectives against other jurisdictions requires secrecy within particular governments, very considerable constraints on openness are imposed.

The Public and the Private

I argued in Chapter I that the accountability of governments required them to operate in the context of relevant, continuous and informed public debate. I argued also that this context cannot be sustained by the opposition parties and the mass media alone. There must then be a complex of private organizations with the resources, disposition and independence of governments to mount a sustained criticism of actual and projected public policies.

Some of the difficulties of effective public debate in Canada are obvious and most of these difficulties adhere in the country's physical size and the dispersion of its population, along with the division of its people into French-speaking and English-speaking elements. There is no elite daily press comparable to such newspapers in the United States and the major nations of western Europe. It is time-consuming and costly to sustain face-to-face contacts among persons with interests in particular aspects of public policy. In comparison with nations with larger populations specialized publications cannot be justified. Canadian journalism, at least in the English language, is of generally poor quality and there are few journalistic specialists in such aspects of public affairs as judicial review of the constitution, foreign policy, labour, environmental control and so on.

In respect to the specifically economic aspects of public policy

debate in Canada is relatively sustained and informed. Within the universities, economics is the best developed of the social sciences and several Canadian economists have distinguished international reputations in such fields as international trade, monetary policy, public finance, natural resource economics and so on. There are elements of a specialized business press. Such private organizations as the Conference Board of Canada, the C.D. Howe Institute and the Canadian Tax Foundation provide a nexus for informed debate on various aspects of economic policy. Within the federal government and the governments of some of the larger provinces a significant number of influential officials have had professional training in economics and these authorities have been more willing to sponsor research in this discipline rather than in the other social sciences.

Part of the explanation for the inadequate quality of debate about public affairs in Canada is the symbiotic nature of the relations between governments, most crucially the federal government, and what one might call the articulate elites. The norms of government decision-makers, both elected and appointed, are that these relations should be collaborative rather than adversarial and there is little general disposition among those outside government who are specialists in various aspects of public policy to resist these influences. There are two developments here. First, there is a general disposition of the federal government to sponsor research of a kind that the public authorities regard as "relevant" rather

than research initiated by scholars and scientists.[28] Second, many public interest organizations -- for example, those representing the interests of native peoples, consumers, ethnic communities, etc., and several human rights associations -- receive most of their revenues from government.

As is the case with business organization, Canada lacks a strong private sector of informed and articulate elites independent enough of governments to sustain a continuing criticism of various aspects of public policy. University scholars are increasingly attracted towards commissioned research for government rather than the projects they initiate themselves[29] and while the public authorities do not usually try to shape the conclusions of the research they sponsor they obviously determine what is to be investigated. In comparison with the United States, Canada lacks such well-led and obstreperous groups as Ralph Nader's organization and Common Cause. The Canadian Civil Liberties Association has

28 See the attack on the "Republic of Science" view of the independence of science from government in A Science Policy for Canada: Report of the Senate Special Committee on Science Policy, Queen's Printer, Ottawa, 1970. Although the Lamontagne Report was mainly concerned with natural science the thrust of its philosophy has been extended to the social sciences as seen in the recent reorganization of federal support for research under the new Humanities and Social Science Research Council.

29 See the criticisms of these new directions in Donald C. Rowat's 1976 Presidential Address to the Canadian Political Science Association "The Decline of Free Research in the Social Sciences", IX Canadian Journal of Political Science, December 1976, pp. 537-547.

only a small fraction of the resources available to their American counterparts. There have been recent cutbacks in federal financial support of "private" groups -- the Canadian Association of Consumers, associations of native peoples and human rights associations.

The penetration of the private by the public authorities has direct and immediate implications for information policies. So far as I am aware, no one has made even a rough investigation of the demands for various kinds of public information in Canada and the extent to which governments are failing to meet these demands. To the extent that these individuals and groups in the "private" sector are in a client-patron relationship with governments, it is unrealistic to hope that their pressures for enhanced access to information will be very insistent. In general terms, effective influences to make government less secret cannot be sustained only by arguments that openness is a good thing which contributes to generalized democratic values but must rather rest on a continuing demonstration that in very specific circumstances the denial by government of information about its activities has unacceptable results. The symbiotic relation between the public and the private in Canada makes this latter prospect not very realizable.

CHAPTER III

INSTITUTIONAL ISSUES

This Chapter examines in a somewhat more specific way some of the major issues related to freedom of information legislation in Canada.

The Need for Freedom of Information Legislation and the "Exclusions" Question

We start in Canada from a situation where the executive has an almost unlimited discretion to release or to withhold information in its possession. To be both fair and accurate, we should recognize that governments are responding positively to influences which would make their operations less secret. Politicians and senior appointed officials, at least the more perceptive ones, realize the needs for more openness to buttress the declining legitimacy of governmental institutions. Opposition parties in our legislatures have more resources than in the past to pry information from reluctant ministers and bureaucrats. There has been some improvement in the amount and quality of investigative reporting by the media.

With all this said, there are strong counter-pressures toward undue secrecy in the operations of government. Our politics proceeds by adversarial methods in which ministers are duly made aware that any information made available about the activities for which they are answerable will be used against them. (The existing currents of thought and feeling hostile to governmental activity as such may cause even "neutral" and "anonymous" civil servants to believe that they live in a hostile world solely because they are on the public payroll). Measures toward more openness will almost inevitably complicate the relations of particular governments with other jurisdictions and private groups. There will inevitably be costs in freedom of information policies at a time when governments are under pressures to reduce spending, and not the least of these costs will be the changes required as documents and other kinds of information are kept in such a way as to serve the needs and interests of the public rather than the convenience of government agencies alone.

Freedom of information legislation is needed to establish the principle that information at the disposal of government is to be made public unless there are strong countervailing reasons. There is every reason to believe in the Canadian context that many such reasons will be found. Yet the existing circumstances do not provide a process by which the demands for secrecy in respect to particular kinds of information are weighed against other values, a process which should ideally take place through vigorous public debate

about these conflicting values. The absence of a legal claim to information means in practice that officials at the middle and even junior levels of the administrative hierarchies have the power to deny citizens the access to information and that this power is used without the aggrieved persons having an effective right of appeal. Legislation would establish such claims.

The effectiveness of legislation establishing the right of access to public information will depend very largely on the number of exclusions from its provisions and the amount of discretion which is conferred on governments to interpret particular exclusionary clauses to their own convenience.[1] The following discussion is related to the most contentious classes of exclusions.

1) Information obtained by a government in its relations with other governments and/or information whose release would be detrimental to its relations with other governments. If such an exclusionary clause was interpreted broadly, it would confer on the executive a discretion so wide as to permit restrictions on access to information concerning most aspects of public policy. There is the further difficulty that the decision to make public

1 cf. the very wide definition of exclusions suggested in the federal Green Paper. The Honourable John Roberts, Legislation on Access to Government Documents, Supply and Services, Canada, 1977. For a critique on this aspect of the Green Paper see the Fifth Report of the Standing Joint Committee on Regulations and other Statutory Instruments, Votes and Proceedings of the House of Commons, June 28 1979, pp. 916-921.

information generated by or directly concerning intergovernmental interactions is inevitably subject to the will of the jurisdiction(s) with most disposition toward secrecy. It may well be that freedom of information legislation cannot be very effective in making intergovernmental relations more open than they now are and that the objective can best be pursued through formalized agreements among governments providing for the release of certain categories of information.

2) "Papers of a voluminous character or which would require an inordinate cost or length of time to prepare".[2] Individuals and groups sometimes request information in a form other than that in which it is compiled by government for its own purposes. To give departments and agencies the unfettered discretion to refuse to produce information under such circumstances would impose indefensible restrictions on access. This would seem to be an area where conflicts might but be adjudicated by the Information Commission described in the next section with the Commission having the authority to direct agencies to produce information in the form it was requested and in determining the time periods allowed agencies to meet such directives.

3) Consultant's reports. Governmental agencies increasingly rely on the investigations and analyses of private consultants and the

2 The phrase is from the Green Paper, p. 32.

reports of such persons are made public or withheld at the unlimited discretion of government itself.

I can find no compelling reasons why reports of private consultants paid for from public funds should not be made public at the time such reports are delivered to the government departments or agencies which commissioned them. Such a rule embodied in freedom of information legislation would go a considerable distance in redressing the imbalance in information between governments and their critics. The quality of the work done by individuals and groups who sell their professional services to governments might well be improved if these reports were open to public discussion and debate. In a negative sense, considerations related to the anonymity and neutrality of public servants cannot reasonably be extended to private consultants.

Of all the types of consultants' reports which should be made public those which attempt to measure public opinion on particular questions rank high. Under what rationale the public can be denied knowing its collective responses as these are sounded by investigators paid from public funds is unclear. Further, to the extent that opinion research is an aid to governments in making them more sensitive to citizen opinion, the withholding of the results of survey research confers an indefensible advantage on parties who are in power which is denied to their political competitors.

4) "Papers excluded from disclosure by statute". In all Canadian jurisdiction there are now many extant statutes, orders-in-council, internal agency rules, etc., which provide for non-disclosure. Ideally, the enactment of freedom of information legislation would be preceded by a thorough review of such provisions by the Department of the Attorney-General or its counterpart to assess whether these correspond to the new and higher weighting now being given to public access.

It is impossible under our parliamentary regime for the legislature to be denied the power to enact further exclusions subsequent to the enactment of a freedom of information law. Yet if openness were to be taken very seriously the procedure provided for in Section 3 of the Canadian Bill of Rights might be helpful. Section 3 states:

> "The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity."

If a similar provision were made part of a freedom of information act, it would require subsequent exclusions to be reviewed in the first instance by the Minister of Justice or his counterpart and subsequently by the legislature in response to an explicit notice by the chief legal advisor to the Crown that proposed legislation

contravened the provisions of the former enactment.

Judicial Review of Ministerial Decisions to Withhold Information

Much of the debate about access to public information in Canada and in other countries with British-type parliamentary institutions revolves around the appropriate role of the courts in reviewing the decisions of ministers to withhold information.

The Green Paper issued under the authority of the federal Secretary of State in 1977 argues the case against judicial review in these terms:

> "One of the cornerstones of our system of parliamentary democracy is that Canadian courts and the judges who sit on them must not only be completely independent of the political process but must also be seen to be so. The role of the judge is the impartial arbitrator; he must ensure that justice is fairly administered in the resolution of legal problems. To require that he become a judge of a Minister's actions, that he should have the power to replace the opinion of the Minister with his own opinion, is to change his role entirely and to bring him into the political arena where he cannot properly defend himself. All of this could seriously threaten the independence of the courts and thereby place in jeopardy our present judicial system.
>
> Under our current conventions, it is the Minister who must remain responsible for deciding whether to refuse or grant access to documents and this responsiblity is a constitutional one owed to his Cabinet colleagues, to Parliament and ultimately to the electorate. A judge cannot be asked, in our system of government, to assume the role of giving an opinion on the merits of the very question that has been decided by a Minister. There is no way that a judicial officer can be properly made aware of the political, economic, social and security factors that may have led to the decision

> in issue. Nor should the courts be allowed to usurp the constitutional role that Parliament plays in making a Minister answerable to it for his actions." [3]

A spirited attack on the Green Paper position has been made by Professor T. Murray Rankin of the University of Victoria in a study on the freedom of information issue prepared for the Canadian Bar Association.[4] Rankin's arguments were along these lines:

1) Access to information is a human right, and the general development of human rights is to restrict administrative discretion by legally enforceable claims.

2) The pristine doctrine of parliamentary sovereignty as elaborated by A.V. Dicey and reiterated by the White Paper is no longer legally defensible. As we have seen, in Conway v. Rimmer the House of Lords challenged the unrestricted right of ministers to withhold documents from public scrutiny. In the Canadian context parliamentary sovereignty is inapplicable because not Parliament but the constitution is sovereign, and the courts have consistently and from the first reviewed the enactments of legislatures in delineating the respective powers of the federal and provincial authorities. There are other instances of judicial review of the

3 pp. 17-18.

4 Freedom of Information in Canada: Will the Doors Stay Shut?, Canadian Bar Association, 1977.

acts of Ministers or of others acting under their authority such as in circumstances where the courts are involved in judging whether the procedural requirements of legislation and/or natural justice have been met. These and other limitations on the powers of ministers, cabinets and legislatures are compatible with British-type parliamentary institutions.

3) In political terms, cabinet and ministerial responsibility no longer prevail. Because of strict party discipline the elected executive controls Parliament. Within the executive decisive powers have shifted to appointed officials who are not effectively accountable to their political masters.

4) Decisions related to the disclosure or non-disclosure of information are not in the true sense of the word political but are rather those of procedure. The courts are the appropriate institutions to have the final say in procedural matters.

The debate as it has been outlined has been posed in rather doctrinaire terms by both sides and this appears to me not very helpful. Rankin is obviously correct in his assertion that judicial review of various kinds of exercise of ministerial powers has not proved incompatible with the operation of parliamentary government -- it would not have been a very persuasive defence in Roncarelli v. Duplessis for the late Premier of Quebec to have asserted that the effective exercise of his powers as Attorney-General

in controlling liquor outlets permitted him to use such discretion to cancel the liquor licence of a person whose sole offence was in going bail for Jehovah's Witnesses. Thus there is little substance in the argument that judicial review of ministerial discretion relating to the disclosure of government documents would in a general sense challenge the constitutional fundamentals of the parliamentary system.

A more plausible case for ministers having the final word about the disclosure or non-disclosure of documents would assert that this is a necessary power if ministers are to carry out effectively and to be held accountable for the responsibilities conferred on them by law. Thus if ministers are to be accountable rather than merely answerable, as these terms were used in Chapter I, the minister must have had the actual power to cause things to happen as they did. In specific terms a minister responsible for government purchasing policy might claim with some plausibility that his efforts to obtain the most favourable prices for particular commodities would be frustrated if all the interdepartmental discussions relating to standards of such purchases were made public. Similarly, the selection of adequate persons for public employment might be said to require the solicitation of information about such persons from those who know them and that the kind of frank assessments necessary will not be made available unless those from whom the information is requested are assured it will remain confidential. However, it seems to me that no general answer can

be given to the question as to whether ministers require the powers to withhold information in order to be made effectively accountable for the responsibilities conferred on them by law.

If the aim is to reduce secrecy in government through judicial review the courts must have the disposition to challenge the actions of ministers in withholding documents with some frequency as has been the case in the United States. Rankin makes a strange argument here:

> "Ironically, if one wanted to choose a class of persons most likely to be sympathetic to the claim that politicians must have access to fair and candid advice and that certain documents should not be disclosed, one would find it difficult to choose a more appropriate group than the judiciary ... there is an overwhelming homogeneity in the Supreme Court of Canada: exclusively male, average age of 68, members of an upper middle class professional elite, and with one recent exception, uniformly Protestant or Roman Catholic. The process of judicial selection has also ensured that the dominant political values and outlooks of the two major parties are certainly shared by the judiciary." [5]

In other words, Rankin's assessment is that Canadian judges are unlikely to be aggressive in overturning ministerial decisions to withhold documents. I think this is a sound evaluation; Canadian courts, and most crucially the Supreme Court of Canada, have shown a marked reluctance to challenge federal enactments or executive acts as being contrary to the Canadian Bill of Rights and one might expect a similar deference to the elected authorities if freedom of

5 p. 127

legislation were enacted. At least the present generation of judges has absorbed the norms of Dicey's formulation of parliamentary sovereignty, and it will be a generation in the future until those whose political values have been so shaped will have been replaced by persons in the newer and more activist traditions of jurisprudence now influential if not dominant in the law schools and among younger members of the legal profession. But if Rankin's assessment is accurate, what are the gains for more open government attendant on judicial review of administrative discretion?

Something needs to be said about the appropriateness of judicial procedures and the judicial method in making the final decision about the disclosure of government documents. Again the debate between Rankin and the authors of the Green Paper has been polarized in a somewhat unhelpful way. To Rankin the disclosure issue is essentially procedural, and it is plausible to argue that judges are the most able group in society to pronounce on whether procedural requirements have been followed. The Green Paper on the other hand asserts that such decisions are essentially political in the sense that they are based neither on settled rules nor the imperatives of an expertise recognized as appropriate to such matters. Thus it is argued, "There is no way that a judicial officer can be properly made aware of the political, economic, social and security factors that may have led to the decision [not to disclose information] that may have led to the

decision in question."[6] Rankin argues that such a view is based on one or other of two untenable assumptions "either that the evidence or arguments that a Minister can advance to support non-disclosure are so insubstantial or ephemeral that he could never hope to persuade an independent person of their worth, or that a judge lacks the intelligence or capacity to understand the evidence or arguments and give them appropriate weight."[7] But this misses the point. The operative words in the Green Paper are that a judge cannot be "properly made aware" of the total context of an issue involving disclosure. This is not I think a slur on the "intelligence or capacity" of judicial officers but rather a frank recognition that the restricted definition of what a judge in his official capacity treats as evidence will inhibit him in making adequate decisions as to what should be made public. On the other hand, those making political decisions have by definition unlimited discretion in evaluating what evidence is relevant to such decisions and in weighting the conflicting elements of this evidence.

It is, however, possible that Canadian judges would be more aggressive in challenging ministerial discretion under freedom of information enactments than either Rankin or I suppose. The renewed efforts to "entrench" human rights, including linguistic

6 p. 18.

7 p. 126.

rights, in the Canadian constitution clearly contemplates a more active role for judicial review in defining and enforcing these rights. If, as seems to me unlikely, Canada is endowed with a new constitution along the lines of the current federal proposals we could expect a more active role for judicial review as the courts give flesh to the provisions of the new constitutional settlement.

Yet if Canadian courts -- most crucially of course the Supreme Court of Canada -- came to challenge elected officials and bodies more frequently than in the past, on what sources of legitimacy would the judiciary draw? Russell has pointed out that the position of our judges is analagous "to that of the monarchy facing the advance of parliamentary democracy: they could best retain popular respect by denying that they have real power. But unlike monarchy, myth and reality in the judges' case have remained too far apart. It is unlikely that as the public becomes more sophisticated about the realities of the judicial process, judicial power can continue to shelter behind the mask of an ideology which denies the very existence of that power."[8] The American political culture is more compatible with an active judicial role -- the tradition of checks and balances, along with

8 Peter Russell "Judicial Power in Canada's Political Culture" in M.L. Friedland, Editor, Courts and Trials: A Multi-Disciplinary Approach, University of Toronto Press, 1975, p. 79.

the necessity in this of judicial delineation of the respective responsibilities of executive and legislative powers; the visibility of the political process by which Supreme Court judges are nominated and the selection ratified and the election of judges in many states; the legitimacy of the Constitution itself with the consequent legitimacy of institutions giving it authoritative interpretation.

For the reasons to which I have alluded, it seems wise to me to assign a limited role to the judiciary in interpreting and enforcing freedom of information legislation. If we are to have such legislation at all, judicial review cannot be precluded entirely as courts in our tradition challenge "privative clauses" meant to oust them from deciding on questions of law. Yet the judicial role should be narrowly restricted. Courts are unlikely to be aggressive in challenging the decisions of ministers and governments to withhold information. Legally-defined rules of evidence are likely to be unduly restrictive in evaluating the appropriateness of executive decisions to maintain secrecy. Judicial challenges to elected officials are likely to erode further the reputation of courts and judges for impartiality.

An Information Commission responsible to the legislature would seem to me to be an appropriate body to rule on decisions of ministers or governments to withhold information. This body might be assigned a more general responsibility to make a continuing review of

government information policies and to bring these to the attention of the legislature but my attention here is directed to the narrower role defined above. The Information Commission would be composed of three persons. The presiding officer would be the nominee of the Lieutenant-Governor in Council, the other officer of the Leader of the Opposition and these persons would choose a third member. If the nominees of the government and opposition could not agree on a third colleague, this person would be chosen by the Chief Justice of the Supreme Court of the province.

Members of the Information Commission would serve during "good behaviour" for, perhaps, 7-year terms and be removable only by the legislature in response to a motion by the Lieutenant-Governor in Council.

The Information Commission would rule on all requests for government information which have been refused, whether these were made by members of the legislature or by members of the public. Its rulings by majority vote would be final and conclusive, subject of course to judicial review on points of law. The Commission would have unrestricted authority to determine the kinds of evidence relevant to its inquiries and to demand that such evidence be produced and to decide when its proceedings would be held in camera.

The scheme which I have outlined would seem to be the most appropriate available for weighting access to public information and other values. It would be more accessible than the courts of law, its procedures would be less complex and the total context of particular situations could be more easily reconstructed by such a body not being bound by the kinds of rules of evidence prevailing in the courts. It would answer in part at least the objections of those who believe it inconsistent with the principles of parliamentary government that courts should review ministerial decisions. Most crucially, persons who had been refused information would not be subjected to the costs and delays of litigation in challenging such decisions.

The success of such a plan would be determined by several conditions, including of course the calibre of persons appointed to the Information Commission and the general disposition of the government and the appointed officials who serve it toward freedom of information. The statute governing access to information would need to be carefully drawn, and in particular the exclusions should be specified in relatively explicit rather than general terms. The terms of reference of the Commission itself should be specified carefully -- the current experiences with the Ombudsman in Ontario point up the dangers of giving this body too wide a latitude in defining its scope of activity as it developed. Lastly, it would be hoped -- again with the Ombudsman situation in mind -- that there would be a general understanding between the Commission

and the government from the first as to the demands the former would make on the public treasury.

Conclusion -- and Exhortation

Freedom of information legislation is needed to establish openness as a fundamental value in shaping the processes by which Canadians are governed. Openness is obviously not the overriding value in all circumstances. Yet legal limitations on executive discretion are necessary to ensure that when disclosure of information conflicts with other considerations there is a procedure by which competing values can be weighed through public debate.

So far as the formulation of public policy is concerned, there are, however, severe limitations in the capacity of legislation to establish openness. The crucial processes which are not amenable to such regulation consist of the ongoing processes of discussion and debate within governments themselves -- interactions within the bureaucracy, between members of the bureaucracy and ministers and among members of the cabinet. The imperatives of parliamentary government appear to be that these relations are carried on within the context of a high degree of confidentiality and that the scope of this confidentiality be determined by executive discretion, ultimately of course by cabinet decision.

We have here the paradox that the most highly political decisions of government which should ideally be subject to vigorous public debate are characteristically made within a secret context. A political decision, to repeat the definition given in Chapter I, is one which is based "on considerations other than those derived from law or settled policy or from the imperatives of what are regarded as the appropriate kinds of expertise". The distinction between the political and the non-political is often unclear, but under the parliamentary system ministers and cabinets retain a high degree of discretion to make this distinction as they choose in particular circumstances. Another and very crucial element of this discretion is to weight conflicting values -- financial, administrative, partisan-political and so on.

There is the ever-present possibility of conflict between the structural and public debate requirements of political accountability. After a long period of vigorous and confidential discussion within the government -- discussion which often involves representatives of interest groups as well -- a government decides on a settled policy. Ministers will defend this policy. But the crucial question often remains -- are these the <u>real</u> reasons for the decision? Even if a significant amount of information related to the decision is made public on a <u>post hoc</u> basis, what <u>were</u> the weights assigned to conflicting considerations? And if the government is firm in its decision, is there any recourse, short of its defeat in the legislature and/or in a subsequent general election?

The issuing of White Papers, Green Papers and so on prior to governments committing themselves to particular courses of action have enormous potentialities for making the policy process more open.[9] I have also argued that legislation should compel governments to make public the reports they commission from private consultants. Yet these and other formal procedures making for openness cannot be a substitute for ministers and cabinets taking the public into their confidence in the policy process. This will in itself involve a very new set of attitudes and behaviours from many elected officials -- retreats from arrogance, from the perpetuation of the illusion that affairs are under control when obviously they are not, from the stance that the only appeal against unpalatable decisions is defeating the government in the next election. Only by more widespread dispositions toward openness at the highest levels of government can the declining legitimacy of political institutions be arrested.

9 A.D. Doerr "The Role of White Papers" in The Structures of Policy-Making in Canada, L. Bruce Doern and Peter Aucoin, Editors, Macmillan of Canada, 1971, pp. 179-203.